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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1-97~~ 1070-14

T. ELLIS HODGIN, *Petitioner,*

v.

THOMAS B. NOLAND, City Manager, Martinsville, Va., individually and in his official capacity, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

T. Ellis Hodgin, Petitioner, was the Plaintiff in the Trial Court, and hereinafter will either be referred to as Hodgin or Plaintiff. Thomas Noland, Respondent, and City Manager for the city of Martinsville, Virginia, was Defendant in the Trial Court and hereinafter will be referred to as Defendant or Noland. All references to the Appendix will be designated (App.). All references to Exhibits will be designated (Ex.).

STATEMENT OF CASE

The Plaintiff's Complaint and the Defendant's response in this case joined issue on the reason for the discharge of the Plaintiff Hodgin by the Defendant Noland. The Plaintiff requested a jury trial on the question of damages. The Defendant made no request for a jury trial. The Court determined that inasmuch as there was a disputed question of fact as to the reason for and the manner of discharging Hodgin that he would submit the case to the jury to determine the disputed questions of fact. The Court's decision was announced to the parties and neither the Plaintiff nor the Defendant interposed any objection thereto.

On March 24, 1970, a jury was duly impaneled to hear the case. At the first recess one of the jurors received word of the unexpected death of her father and the Court excused the juror from further service. By agreement of counsel and the Court, the trial proceeded with eleven (11) jurors. At the close of the Plaintiff's evidence, both the Plaintiff and the Defendant moved for directed verdicts and summary judgment, and both motions were denied. The defense introduced its evidence and rested, after which the Court gave its charge to the jury in accordance with the charge that the Court had previously discussed with counsel. The jury retired to deliberate, and, at that time, both Plaintiff and Defendant renewed their motions, which were denied by the Court.

The jury returned its general verdict in favor of the Defendant, and the Plaintiff moved the Court for judgment, notwithstanding the verdict. The Court overruled the motion and entered judgment in the Defendant's favor in accordance with the verdict of the jury.

The statements by the Plaintiff on page 5 of his Petition to the effect that he limited his request to a jury trial to that of damages and on page 6 that he moved the Court for a separate decision as to liability and damages are wholly incorrect and are not borne out by the Record. Moreover, the statement on page 7 that the Court refused to make independent findings is incorrect and not borne out by the Record. A search of the Record will reveal that at no time did the Plaintiff make a request for independent findings of fact.

On appeal the decision of the Trial Court was affirmed and subsequently the Plaintiff petitioned this Court for a writ of certiorari here being considered.

STATEMENT OF FACTS

T. Ellis Hodgin was employed by the City of Martinsville in September of 1967 as librarian for the Martinsville Public Library. The job had no tenure, but was held at the pleasure of the City Manager, as are all jobs under his jurisdiction (App. 102-4; 173; Ex. D-2, D-18).

On July 25, 1969, Hodgin was discharged from his job by Thomas B. Noland, City Manager (Ex. D-27; App. 116, 157-8). Earlier, on July 22, 1969. Noland had asked Hodgin for his resignation, effective September 1, 1969 (App. 114-5). The events that precipitated Noland's action came to his attention in the early part of the month of July, 1969 (App. 111,168).

Around the second or third of July, the Finance Director for the City of Martinsville, Mr. Holladay Yeaman, apprised Noland that he had received a very large number of invoices from the library wherein the

librarian, Mr. Hodgin, had obligated the City to sums of money which heretofore had been unknown to the Director of Finance and that the library was going to substantially exceed its appropriations (App. 111, 168). Several days later, on toward the middle of July, Noland approached Hodgin and asked for an explanation of his action in having accumulated so many unpaid invoices (App. 111-2), around 100 in number, some of which were as much as 6 to 8 months old (see Exhibit D-3 & D-17). At this time, Hodgin's explanation was that he did this in order to qualify for Federal funds (App. 112). Noland accepted this explanation for the time being (App. 112). However, several days later it occurred to him that he had read a contrary bit of information in the past (App. 112). His recollection was that in order to quality for Federal funds, all purchases had to be ordered, received, and paid for by the local library within the same fiscal year (App. 113, 159). Upon further investigation he found his recollection to be accurate and Hodgin's explanation to be inaccurate (App. 159-160). He then determined that Hodgin had intentionally circumvented the City's budgetary controls and on July 22 he asked for Hodgin's resignation (App. 113-4).

The evidence showed that the City of Martinsville had a budgetary control practice under which moneys were appropriated for the various City departments for the specific purpose that the department had requested them (App. 34-5; 161-3). In this instance, the library received an appropriation which was broken down into various categories, the most pertinent here being the books and supplies categories (see Exhibit D-22), which Hodgin overspent by some 46 per cent (Ex. D-25). To maintain a budgetary control, the procedure was that the librarian would order the necessary books and materials

for the library and when he received the invoice from the vendor, he would check to make sure the order had been filled properly and then prepare a City voucher certifying the vendor's invoice was proper for payment against the account indicated on the voucher. The voucher was sent to the Director of Finance, who paid the bill and charged it against the appropriate account (App. 34-5, 161-3). Hodgin was kept informed of the balance in the various accounts by monthly statements sent from the Director of Finance to him. Hodgin had been specifically told he would not be permitted to exceed his budget or to spend from one account for another purpose without prior authorization (Ex. D-4, D-5, D-6; App. 39-42).

To circumvent these budgetary controls Hodgin clandestinely withheld a large number of invoices (App. 39-41, 43, 185; Ex. D-3, D-17). By not submitting them for payment, neither the Director of Finance nor the City Manager had any way of knowing what amounts of money had been spent (App. 165). Hodgin told neither Noland nor the Director of Finance of his activities (App. 43, 124).

This was the reason that Noland asked for Hodgin's resignation. He emphatically denied the allegations of Hodgin that he asked for his resignation because of his participation in a suit which sought to enjoin the City of Martinsville School Board and others from conducting religious education classes (App. 113-4; 117-9; 146). Noland's denial of this allegation was further buttressed by two witnesses, Henry Gilbert, a newscaster for a local radio station (App. 188), and Donald Richardson, a City employee of the City of Martinsville (App. 189). Both witnesses testified that they had made very vigorous complaints to Noland about Hodgin's activities at a School

Board meeting and that Noland had completely defended Hodgin in this activity and had told them that it was Hodgin's right as a citizen to engage in such activity and that he could not be and would not be subject to any disciplinary action because of his engaging in this activity (App. 188-9). Moreover, Noland's helpful attitude was conceded by the testimony of Hodgin himself, who said that Noland had always treated him professionally and that such action was out of character with Noland's prior conduct. Hodgin wrote Noland a letter of appreciation for his help (Ex. D-1; App. 28).

The only evidence offered by Hodgin to connect his discharge with the suit against the School Board was the coincidence of time. Hodgin admitted that Noland never threatened him with discharge; but this was something he surmised (App. 26-8). The School Board suit was filed on July 18 and Hodgin was requested to resign on July 22. But it must be kept in mind that the request for resignation also coincided with the discovery of Hodgin's activities in circumventing the budgetary safeguards which had been established by the City.

Hodgin testified that he did not know why he was being fired (App. 17). This was contrary to Noland's testimony, who said that Hodgin well knew why he was being discharged (App. 112-4, 141, 151), but that he, Noland, did not go into it with him on July 22 and 25 because of Hodgin's rather belligerent attitude and because he anticipated a law suit by Hodgin (App. 147-8, 157-8). Obviously, the jury chose to accept Noland's corroborated testimony over Hodgin's uncorroborated testimony, which was seriously impeached by no less than seven (7) very material inconsistent statements. The seven were: (1) Hodgin stated that he made prior arrange-

ments with Mr. Copps, of Baker and Taylor, for credit (App. 46-7). Copps denied this (App. 187); (2) Hodgin stated that he had not been previously discharged from a job in a library at High Point, North Carolina (App. 62-3). Mr. Austin, librarian of the High Point Public Library, testified that he had discharged Hodgin (App. 159); (3) Hodgin testified that he restricted library services to Dr. Bing because of the complaint of Mrs. Flora, an employee of the library, that Dr. Bing was rude (App. 65). Mrs. Flora denied this (App. 187); (4) Hodgin testified that Noland had not come to him at the end of the fiscal year and discussed with him the excessive number of invoices which had been presented at the end of the fiscal year (App. 9). Noland testified that he had had such a discussion with Hodgin in the first part of July 1969 (App. 111-2); (5) Hodgin's admission that he certified vouchers for payment when he knew there were no funds available for payment (App. 37, Ex. D-3); (6) Hodgin testified he had not refused a library service to Dr. Bing (App. 57). Dr. Bing and Mrs. Nickelston testified he had (App. 186; T. 244); and (7) At trial Hodgin testified he was hired on a year to year basis, but in discovery deposition he said he felt he held his position at the pleasure of City Council (App. 52-53).

STATEMENT OF ISSUES

I. The Trial Judge submitted all issues of fact to a jury for determination without objection by either Plaintiff or Defendant and both parties were bound thereby.

II. Plaintiff was an employee without tenure, and served at the will and pleasure of the Defendant, and his manner of discharge in no way violated due process of law.

ARGUMENT

I

THE TRIAL JUDGE SUBMITTED ALL ISSUES OF FACT TO A JURY FOR DETERMINATION WITHOUT OBJECTION BY EITHER PLAINTIFF OR DEFENDANT AND BOTH PARTIES WERE BOUND THEREBY.

We agree with Plaintiff that 42 USCA, Sec. 1983 brings under its mantle the entire panoply of legal and equitable remedies known to our jurisprudence. This section does not, however, seek to change the nature of those remedies or the procedure by which they are attained. Legal remedies remain legal remedies and equitable remedies remain equitable remedies.

Part of the relief asked for by the Plaintiff in this action was One Million Dollars ($1,000,000.00) in damages. A pure common law action in which a trial by jury is a matter of right, and this is true even though the equitable relief sought may be the predominating remedy in the law suit. *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469, 82 S. Ct. 894 (1962); *Simmons* v. *Avisco, Local* 713, *Textile Workers Union,* 350 F. 2d 1012 (4th Cir. 1965); *Madison* v. *Wood,* 410 F. 2d 564 (6th Cir. 1969).

Federal Rules of Civil Procedure, 38 and 39, make it very clear that the issues to be submitted to the jury are under the control of the Court. If the Plaintiff, in fact, had any objection to the Court's submitting the issues to the jury, he did not register such objection, even though the opportunity presented itself many times. At one stage of the trial, when the Court advised counsel it was necessary to excuse one of the jurors, the Defendant suggested

that the Court might hear the case without a jury. The Plaintiff made no comment at this time but was completely silent (App. 51). Nowhere in the record does it ever appear that the Plaintiff objected to a jury trial on all issues, nor did he attempt to limit the jury's inquiry into the facts by submitting a request for a special verdict or interrogatories to the jury under Rule 49 of the *Federal Rules of Civil Procedure*. The Plaintiff cannot be heard to complain on appeal when he did not raise this issue in the trial court. *Simmons* v. *Avisco*, 350 F. 2d 1012 (4th Cir. 1965).

The Trial Court's power to step in and disapprove the jury's findings of fact was limited by the same principles that limit this Court in disapproving the finding of fact, i.e., it may be done only where there is no evidence to support the jury's finding. There was very ample evidence to support the jury's verdict, and the Trial Court had no alternative but to sustain the verdict. *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740 (1946).

II

Plaintiff Was An Employee Without Tenure, And Served At The Will And Pleasure Of The Defendant, And The Manner Of His Discharge In No Way Violated Due Process Of Law.

In part II of his argument, the Plaintiff urges that the terms under which he was employed, be they statutory or contractual, have no bearing on what he has designated "procedural due process." No statement could miss the mark further, for the very nature of due process is to first balance the needs and harms which flow from a

given action and the very cases cited by the Plaintiff support this. Thus, where the employee's position is very tenuous and subject to the will of his superior, then his "procedural rights" of due process are all but nonexistent. *Nelson* v. *County of Los Angeles,* 362 U.S. 1, 80 S. Ct. 527 (1960); *Vitarelli* v. *Seaton,* 359 U. S. 535; 79 S. Ct. 968 (1959); *Parker* v. *Board of Education of Prince George's County, Md.,* 237 F. Supp. 222; aff. (D-Md. 1965); 348 F. 2d 464 (4th Cir. 1965) cert. denied, 382 U. S. 1030, 86 S. Ct. 653 (1966); *Jones* v. *Hopper,* 410 F. 2d 1323 (10th Cir. 1969), cert. denied, _____ U. S. _____, 90 S. Ct. 1111 (1970); *Freeman* v. *Gould Spec. School Dist. of Lincoln Co., Ark.,* 405 F. 2d 1153 (8th Cir. 1969), cert. denied, 396 U. S. 843, 90 S. Ct. 61 (1969) See also *Cafeteria & Restaurant Workers Union, Local* 473 v. *McElroy,* 367 U. S. 886, 81 S. Ct. 1743 (1961).

In the case at bar it is quite evident that the Plaintiff was an employee at the will and pleasure of the City Manager and subject to discharge without cause. The 1950 *Code of Virginia,* 1964 *Replacement Volume,* at Section 15.1-930, in dealing with the appointment and removal of necessary employees by a city manager, states as follows:

> ". . . such other officers and employees as the council of such city or town shall determine are necessary . . . shall be appointed and may be removed by the city or town manager, who shall report each appointment or removal to the council . . . following any such appointment or removal."

The *City Charter for the City of Martinsville, Virginia,* Chapter 5, Section 1, provides:

> "The administrative and executive powers of the city, including the powers of appointment of officers and employees, are vested in an official to be known as the city manager . . ."

and Section 2 of the same chapter provides that the city manager shall:

> ". . . see that such city officers and employees as the council shall determine are necessary for the proper administration of the city be appointed and may be removed by the city manager . . ."

In the Trial Court the Plaintiff claimed that his status as an employee at will was altered by a contract that he had made for a definite term. But the only item he was able to point to in an attempt to substantiate this was his per annum pay rate (App. 30-2, 53). Plaintiff, however, has conceded that no contract for a term of office existed (see page 3 of Petition and pages 44 and 53 of Appellant's Brief in Fourth Circuit).

The rule covering the term or tenure of a public employee is stated in 43 *Am. Jur.,* Public Officers, Sections 183 and 184, wherein it is said:

> When the term or tenure of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provisions, the general rule is that the power of removal is incident to the power to appoint. Inasmuch as the tenure has not been declared by law, the office is held during the pleasure of the authority making the appointment, and no formal charges or hearings are required in the absence of some statute on the subject. The foregoing rule applies although the appointing power attempts to fix a definite term." (p. 31)

> "The general rule as to offices created to be filled by appointments is that if the legislature does not designate the term of the office, the appointee will hold only during the pleasure of the appointing power and may be removed at pleasure, at any time without notice or hearing." (p.32)

These principles have been consistently recognized by the federal courts. In *Cafeteria & Restaurant Workers Union, Local* 473 v. *McElroy,* 367 U. S. 886, 81 S. Ct. 1743 (1961), it was said:

> "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." 367 U. S. p. 896, 81 S. Ct. p. 1749.

Accord: *Vitarelli* v. *Seaton,* 359 U. S. 535, 79 S. Ct. 968 (1959). It appears, then, that inasmuch as there was no statutory enactment giving Hodgin tenure or job security of any nature that Noland had the authority to discharge him at will.

The next question to logically rise in the order of things is: In the exercise of his power, what procedural requirements does the concept of due process impose upon Noland? Turning again to *American Jurisprudence,* this statement is found under the heading of *Hearing When Removable at Will*:

> "No formal charges or hearings are, as a rule, required when a public officer holds only at the pleasure of his superiors, as where the provisions for appointment prescribe no definite term and does not require that the removal be for cause, or where the removal be for cause, or where the removal depends on the exercise of

personal judgment on the question of whether cause for removal exists. It has been seen that the holder of a public office without a definite term holds at the pleasure of the appointing power. So, also, a grant in general terms of the power to remove public officers carries with it the right to remove at any time or in any manner deemed best, with or without notice and hearing." 43 *Am. Jur.*, Public Officers, (Sec. 213, p. 52)

Parker v. *Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md. 1965); aff. 348 F. 2d 464 (4th Cir. 1965); cert. denied 382 U. S. 1030, 86 S. Ct. 653 (1966), is virtually on all fours with the case at bar. In the district court opinion statement of facts, it is found that the plaintiff Parker was a high school teacher, who had taught in the Maryland School System for a period of two years. He had not attained tenure and under his contract was subject to being discharged upon the school board's giving notice to him that his contract would not be renewed. During his second year of teaching, he was notified by the school board that his contract would not be renewed. After being so advised the plaintiff requested from the board a statement of charges and a hearing, which were not furnished by the board. He then filed suit alleging that his constitutional rights had been violated in that: (1) His contract was not being renewed because he was using a book in his class entitled *Brave New World,* which the administration found objectionable; and (2) That because he had not been told why his contract was not being renewed, his right of procedural due process was being violated. Chief Judge Thomsen heard the case on a motion to dismiss the Complaint and, in denying the relief prayed for, stated:

"Generally, in the absence of statute or unreasonable discrimination, a public employee

> may be summarily discharged from government service without the necessity of a hearing, and such action does not amount to a denial of due process." (p. 228)

The Fourth Circuit Court of Appeals approved the action of Judge Thomsen and this Court approved the action of the Fourth Circuit Court of Appeals by denying certiorari.

Another case which is very close factually and which deals with the same legal problems presented in the case at bar and presented in *Parker* is found in the *en banc* decision of the Tenth Circuit in *Jones* v. *Hopper,* 410 F. 2d 1323 (10th Cir. 1969) cert. denied, ____ U. S. ____, 90 S. Ct. 1111 (1970). Here, as in *Parker,* a teacher in his second year was notified by the Regents that he would not be rehired. He charged that the reasons for failure to rehire him were because he had objected to the college's action in not hiring an Oriental professor, had criticized the English Department's use of a textbook, had founded an independent faculty-student newspaper, had supported a student who refused to register for the draft, and had criticized the Viet Nam War, all of which he claimed to be protected by the First Amendment. The letter from the college notifying the plaintiff that he would not be rehired for another term gave no reason for the action of the Board of Regents. The case was heard on the pleadings. In analyzing the problem at hand, Chief Judge Murrah, speaking for the majority, posed this question:

> "What guaranteed right, privilege or immunity was denied (plaintiff) which is protected under the Constitution and laws?" (p. 1327)

After determining there was no breach of contract on the part of the college, he said:

> "It is admitted he did not have a tenure privilege either by Colorado law or contract. 'Among the most fundamental rules of the law of master and servant is that which recognizes that, absent and applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee with or without cause.' " (p. 1328)

* * *

> "One has no constitutional right to a 'remedy against the lawful conduct of another.'
>
> "As demonstrated above the right, privilege or immunity (plaintiff) alleges he was deprived of is nonexistent." (p. 1329)

Accord: *Freeman* v. *Gould Special School Dist. of Lincoln County, Ark.*, 405 F. 2d 1153 (8th Cir. 1969), cert. denied 396 U. S. 843, 90 S. Ct. 61 (1969). (Note Judge—now Justice—Blackmun participated in this decision.)

These decisions are in accord with the decisions of the United States Supreme Court as announced in *Vitarelli* v. *Seaton*, 359 U. S. 535, 79 S. Ct. 968 (1959); *Nelson* v. *The County of Los Angeles*, 362 U S. 1, 80 S. Ct. 527 (1960). In *Vitarelli* the court remanded for further action an attempted discharge by the Secretary of Interior because in discharging the petitioner, who was an employee at will, the Secretary had violated his own self-imposed restriction. In deciding the case, however, the court made it clear that but for the self-imposed discipline, the Secretary's action would have been approved when it said:

> ". . . The Secretary here . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations, he could have discharged the petitioner summarily." (359 U. S. p. 540 and 79 S. Ct. p. 973)

Nelson specifically approved the above language in upholding the summary discharge of a probationary employee. Even the dissenting justices conceded:

> "Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all and this Court has not held that it would offend the Due Process Clause, without more, for a state to put its entire civil service on such a basis, if as a matter of internal policy it could stand to do so. But if a state discharged even a probationary employee because he was a Negro or a Jew, giving that explicit reason, its action could not be squared with the Constitution . . . So here, California could have summarily discharged Globe, and that would have been an end to the matter; without more appearing, its action would be taken to rest on a permissible judgment by his superiors as to his fitness." (362 U. S. p. 16, 80 S. Ct. p. 535)

See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 81 S. Ct. 1743 (1961).

How does Hodgin's position compare with the foregoing cases, particularly *Parker* and *Jones?* Hodgin was an employee of less than two years, just as Parker and Jones were. Hodgin alleges First Amendment violations as being the real reason for his firing, as did Parker and Jones. Hodgin alleges lack of procedural due process in that he was not informed as to the reasons for his discharge, as did Parker and Jones. It would appear that the

only possible distinction between Hodgin's situation and the factual situations in *Parker* and *Jones* is that Parker and Jones were told that their contract would not be renewed, and they alleged that they had a right of expectancy to the renewal, whereas Hodgin was employed under a contract at the will and pleasure of his superior, and he alleges he had a right to expect it to continue. If this is a distinction, then it is one without a difference, because neither Hodgin, Parker, or Jones had any tenure or legally enforceable right to remain in the job they occupied.

The Court in *Freeman* v. *Gould Special School Dist. of Lincoln County, Ark.*, 405 F. 2d 1153 (8th Cir. 1969), cert. denied, 396 U. S. 843, 90 S. Ct. 61 (1969) did not recognize such a distinction as having legal significance when it said:

> "We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiffs has gone so far as to say that all actions of any governmental board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and a *right to retain the position,* except for cause, and 'for cause' presupposes a right to hearing, notice and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continue public employment, *except insofar as he may not be dismissed or fail to be rehired* for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution." (p. 1159, emphasis supplied)

In distinguishing a case that the plaintiffs had cited for the proposition that plaintiffs had to be accorded substantive and procedural due process, the Court commented as follows:

> "On the basis of this holding, plaintiffs then project that the Board must accord due process, both substantive and procedural, in all of its operative procedures. If this were so, we would have little need of tenure or merit laws as they could only be, as argued by the plaintiffs, a discharge for cause with the school board carrying the burden of showing that the discharge was for a permissible reason. We do not believe this to be the law as there are *many public employees who are separated from their employment* by a purely arbitrary decision, upon a change of administration or even a change of factual control where the appointments are not protected by civil service or some type of tenure, statutory or contractual." (p. 1160, emphasis supplied)

In asking the same question that Judge Murrah asked in the *Jones* case: What guaranteed right, privilege, or immunity, which was denied Hodgin, is protected under the Constitution and laws? One must give the same answer that he gave, i.e.: As demonstrated above, the right, privilege, or immunity Hodgin alleges he was deprived of is nonexistent.

If this Court followed the reasoning of the first Circuit Court of Appeals in *Drown* v. *Portsmouth School District,* 435 F. 2d 1182, (1st Cir. 1970), then those charged with the administration of public offices which must hire employees would not be able to engage employees on a probationary or at-will basis. The reasoning in *Drown* envisions that the discharge of an employee be for cause which forecloses the administrator's exercise of

his judgment on many intangibles which may or may not equate to a discharge for cause. Certainly this approach to public employment does not square with the principles laid down by this Court in the cases of *Vitarelli, Nelson,* and *Cafeteria Workers.*

The Plaintiff's argument of the lack of procedural due process destroying substantive constitutional rights does not bear close analysis. In every case where an employee has been discharged for an impermissible reason, there has been a long history of attempted discipline of the employee by the employer or an announced reason that the discharge is for the impermissible reason, *viz.*, *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968). It is the history of the case or the announced reason for the discharge that has the "chilling" effect on fellow employees. It is hard to imagine why an employer charged with the responsibility of hiring and discharging employees would harbor secretly a complaint of some constitutionally protected nature and discharge an employee for this reason. Where a controversial matter arises, there will always be sufficient evidence to show that that was the reason for the discharge, if, in fact, it is the reason.

CONCLUSION

Notwithstanding the urgings of the Plaintiff that the outcome of this lawsuit will shake the employees of the public domain from center to circumference, the law suit is important only to the litigants. It will establish no new precedent. The Plaintiff has had his day in Court and submitted his cause, which was basically factual, to a jury of his peers, and they found against him. The trial judge was eminently correct in his decision on the law,

as demonstrated in the foregoing discussion and, therefore, the Petition for Writ of Certiorari should be denied at the cost of the Plaintiff.

Respectfully submitted,

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CERTIFICATE

I, Jackson L. Kiser, of Young, Kiser & Haskins, 60 West Church Street, Martinsville, Virginia, do hereby certify that on or before the day the Respondent's Brief was filed with the Clerk of the Supreme Court of the United States, I mailed three copies of the said Brief to John C. Lowe and Robert P. Dwoskin, of 1111 West Main Street, Charlottesville, Virginia 22903, counsel of record for the Petitioner.

JACKSON L. KISER
Of Counsel for Respondent